

THE STATUS OF ALIENS ACCORDING TO THE
INTERNATIONAL LAW OF PEACE

BY

JOHN EVERETT WILLIAMS

A.B., St. Viator College, 1923

A.M., Catholic University of America, 1929

S.T.B., Catholic University of America, 1930

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SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
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This study is an attempt to determine whether an alien has rights and duties according to international law and if so the extent to which that law protects and obligates him in their exercise. To accomplish our objective we begin with a consideration of the individual as such, for the individual in society is the foundation of all law. The welfare of people is the object of law and all law must respect and protect human values. Human personality implies that fundamental rights be acknowledged and protected by society for its own good and its continuing existence. This truth is recognized by municipal law which protects the individual in his rights, but regulates his conduct in the common good. Thus by positive legislation, rights which have their foundation and *raison d'être* in human personality, become legal and enforceable in society. This is acknowledged in constitutional and municipal codes of law throughout the civilized world, even though at times it may be lost sight of or even denied in particular jurisdictions. The question which confronts us now in our study is whether these human and municipal rights are also protected by the principles and sanctions of international law.

It may be said that international law recognizes the value of the individual and secures a recognition of his rights, but it nevertheless does this only in an indirect way. The traditional and still dominant view of the relationship of international law and the individual is that he is an object, not a subject of that law. By this is meant that the individual as such, has little or no standing in international law in his own name. International law is primarily a law among states and only occasionally does it concern itself directly with the individual. The principal concern of international law is to see that states observe their obligations towards other states of the international community. Rights and duties are predicated of states. But states are made up of citizens and the duty of the state is to protect its citizens

in their welfare both at home and abroad. In return for the allegiance, support and defense of its citizens, the state in turn must use its accumulated power for their protection and advancement. Its concern is its own people primarily, but in the world of international relations, the state must also look to conditions beyond its own territories if it would fulfill its obligations even to its own people. Consequently there has developed a great mass of customary and conventional law looking to the welfare of peoples of various nationalities and allegiances in their contacts with one another. It has long been recognized that as long as allegiance persists nationals may expect their state to use its prestige and if necessary its power to assure them of a protection consistent with law and with circumstances wherever they may be. There are conditions and circumstances in which the allegiance of a person to a particular state may be terminated but as long as he remains its national mutual rights and duties persist. Because of this fact it is almost necessary for a person to have a nationality—to be attached to a particular state by bonds that are recognized among all nations, and that make an individual the beneficiary of the rules of international law operative among the nations.

NATIONALITY

Because nationality is the legal relationship that ordinarily brings the alien into the field of operation of international law, its importance can scarcely be over-estimated. Nations are, for the most part, free to determine who shall be their nationals, but this is not exclusively a domestic matter. It has many international implications, and conflicts of law on nationality and naturalization are productive of many misunderstandings and of much hardship.

Conflicts of nationality laws are common chiefly because nations operate under either one or both of two rules of nationality, *jus soli* and *jus sanguinis*. As a consequence a person may be without nationality—a man without a country. He becomes an international problem for he cannot live to himself alone and he cannot demand the protection of a particular state.

If he has lost his national character through persecution and has had to flee his own country, he becomes a burden upon other states. These certainly are concerned in the settlement of the problem of nationality which makes this situation possible. It has wide application at the present time when many countries are burdened with refugees.

A person may also at times be claimed as a citizens by two or more countries. He is subject to obligations to both and may be punished for neglecting the one or the other. This occurs when the person wishes to travel in a third country or when he returns to his original homeland. If this country seeks to enforce its demands upon him as upon its other citizens, diplomatic controversy ensues. If a nation goes so far as to try to force its former citizens into its armies, wars may result. The impressment of sailors who had left England and become naturalized American citizens was one of the causes of the War of 1812.

As a consequence of such difficulties, it is now generally recognized that a person who leaves his own country and becomes naturalized elsewhere should be entitled to the protection of his adopted state. Certain conditions must be present however, such as those of having fulfilled his duties to his former state, formally renounced allegiance to it and permanently identified himself with his adopted state. There is need for uniform nationality laws, and multilateral conventions may in future be more successful in settling the vexatious problems of conflicts of nationality laws.

In the event of state succession, the personal and property rights of aliens continue until new laws or regulations are promulgated. These new laws in turn must observe the requirements of international law and the new government must defend its action governing these on the general rules of international responsibility and diplomatic protection.

When we compare the citizen and alien as governed by international law, we appreciate that they occupy essentially different positions in respect to the state of residence. The citizen owes allegiance that is exclusive and supreme in the sphere

of government and he is as a consequence more closely bound to the state of his residence than is the alien. The alien owes permanent allegiance to another state and his relationship with the state of residence is conditioned upon this fact. This relationship is temporary and can be terminated by action of the state or of the alien. It is true that as long as the alien remains in a country he must obey its laws and be subject to its authority, but is it likewise true that these laws and this authority must respect the claim of another state upon his allegiance. The jurisdiction of the state of residence is territorial; that of the state of allegiance is personal, and the two are not identical. It follows that duties which imply allegiance must not be forced upon an alien. In turn privileges or functions which demand exclusive loyalty need not be granted to an alien. A nation may be generous in this respect but its own security and self-interest justify it in limiting political and other privileges to its own citizens. Thus in matters which are not the concern of the international minimum standard, or which are intimately bound up with the welfare and security of the state and its people, the state of residence justly claims a good deal of latitude. For example it may limit ownership of certain kinds of property, or it may restrict certain occupations to its citizens, but it may not take away the right of the alien to earn a living and to enjoy a freedom which is not inconsistent with the safety of the state. So while the position of the alien is legally different from that of the citizen, it is not necessarily inferior.

ENTRANCE OF ALIENS

In ordinary times a person should have the right to change his country of residence and allegiance. It has sometimes been maintained that a person has a natural right of expatriation. There is no nation today, however, which accepts this doctrine. Its inconsistency with other parts of the law of nations, such as the right of a state to exclude aliens, is seen when we realize that the right of expatriation from one country logically implies the right of entrance into another country. The whole history of immigration laws and policies militates against such a doc-

trine and denies it a place in modern international law. However, it would be contrary to the spirit of the law of nations for one state to forbid its nationals to seek a better life in another country in normal times. A state may demand, however, that its people not leave during time of war or national emergency or without having fulfilled their obligations to it, such as obligations of public or military service, of having paid their just share of taxes and other things of like nature. Some nations still try to keep their nationals from emigrating but their attempt to prevent it entirely has not the support of the international community. To avoid controversy, however, nations sometimes refuse to accept aliens who have not secured from their own state a permit to emigrate, or who have not fulfilled other requirements of the local law.

Considering the migration of peoples from another point of view, it is recognized that a state may refuse to accept aliens into its territory. It may, as an incident to sovereignty, enact legislation governing the character of its national population. Consequently, it may exclude individual aliens or classes of aliens whom it considers inimical to its best interests. It commonly excludes classes of people such as criminals, anarchists, dependents or competitive laborers. It may even exclude peoples of particular races but should not make race the sole reason for its discriminatory laws. If it should do so, it would invite protests from other nations and the legality of the policy would become matter of international controversy and probable retaliation and possible war. As a result nations justify discriminations against particular peoples or races by alleging other reasons, such as the standard of living or differences of civilization, culture and law, for their policies.

The exclusion of Orientals by the United States and other nations has brought bitter feeling among the Japanese and Chinese, and while a gentleman's agreement was forced upon the Japanese, resentment still smoulders and they do not accept the subterfuges with which the United States attempts to disguise its discrimination. The National Origins Law of the United

States faces similar objections, but the period of time it has been in operation has been one of small immigration, and it has not worked serious inconvenience or resentment among the nations whose quotas are small. It is controverted whether a state might exclude all aliens but the question is one of speculative right rather than of practical law or policy. Since no nation has entered upon a policy of absolute exclusion of aliens, a nation which should attempt it now would soon be regarded as an international outlaw. However, we must conclude that international law, while it tempers the immigration policies of states, has comparatively small control over them.

DEPORTATION OF ALIENS

When an alien has been admitted to a country he enjoys greater benefits from the operation of international law. While he may be deported from a foreign country, international law demands that certain conditions be fulfilled in the process. Reasons for deportation should be incorporated in promulgated law and should affect alike aliens of all nations in the specified classification. Deportations may be made for numerous reasons: political, religious, economic. The state, however, must be prepared to make known these reasons to the state of the deported alien; otherwise its deportation action may be considered an unwarranted slight of an equal member of the international society as such and an unfriendly act calling for protest or retaliation. Further, in the execution of an order of deportation, a state must treat the alien with justice and must not be unnecessarily harsh or cruel. A regular court trial, such as the constitution and laws of a country prescribe for the trial of criminal offenses, need not be given. Administrative courts or agencies ordinarily are the final judges in deportation proceedings. The accepted procedures of international due process of law insuring a fair hearing, should be observed under penalty of the invoking of denial of justice.

STANDARDS OF JUSTICE IN THE TREATMENT OF ALIENS

When an alien is established in a foreign country and permitted to remain there, he receives considerable protection from

international law. One of the general principles of international law affecting his status there is the international minimum standard of treatment. Although the minimum standard is indefinite in its prescriptions, it has found workable application in the decisions of courts and the agreements of governments. It is often appealed to in diplomatic correspondence and has found its way into many treaties as a gauge of the treatment of aliens. Attempts of certain nations to invalidate or evade it by substituting restrictive national treatment or by enforcing the Calvo doctrine have not been successful. As a consequence a domestic law which contradicts international law will not be enforced by an international court. The Permanent Court of International Justice has frequently enunciated the principle of the primacy of international law and the necessity of a change in municipal law in cases of conflict. The principle of national treatment may be acceptable if it is a concession above the minimum requirements of the international standard, which is the ordinary purpose of national treatment clauses in treaties, but it cannot be made the basis of a law governing all or the majority of nations. Acceptance of the opposite contention would amount to denial of international law as a law among states and would result in a breakdown of the established system.

The first requirement of the international standard is one of law. The municipal law governing must be such as to render safe and orderly the life of the community. A system of law which would fail to provide adequate safeguards for safety of life and property would be considered a warrant for interference by foreign nations. This is especially true if, in addition to its inferior quality, the law should discriminate against aliens. Too great a disparity between local law and civilized standards has in the past resulted in the establishment of extraterritoriality in many places and has been the reason for the forceful occupation of foreign lands on innumerable occasions. When nations have wished to escape extraterritoriality or forceful occupation, they have been compelled to elevate the tone or change the

character of their local law to meet the demands of more advanced nations. As a result, extraterritoriality is much less common than in former times and forceful occupations on this basis have become less frequent.

A second requirement of the international minimum standard relates to the efficiency of the state in the enforcement of its laws. If the alien claims rights under domestic or international law, he must be given legal means to enforce these rights. If he has been accused of crime he must be given an opportunity for a fair hearing before an impartial court. He has the right to a trial, to counsel, to witnesses and the other necessary safeguards to his liberty and safety.

A government similarly becomes responsible to the state of the alien if in failing to maintain law and order, it neglects to protect the alien in his person or property against injury or loss from the unlawful acts of individuals, mobs or revolutionists. The state is not immediately responsible for all violations of law and all injuries resulting therefrom but, if it has been at fault, it has the duty of bringing the offenders to justice and of remedying the evil effects as far as possible. (In case of civil war, the placing of responsibility is more difficult but the state is expected to take reasonable care in preventing unnecessary injuries and losses. In case of successful revolution the new government has the responsibility of adjusting the claims of aliens with their governments.) It is in connection with the reparation of injuries suffered that exhaustion of local remedies and denial of justice have application. The first remedy for the alien is in recourse to the local law enforcement agencies, chief of which is the court system of the country. It is presumed that the courts are efficiently organized and that they are able and willing to grant a fair hearing or trial to an aggrieved alien. If the law enforcement system of the country has broken down, or if the officials are unable or unwilling to deal fairly with an alien, there is no obligation on his part to exhaust local remedies before appealing to his own state for diplomatic protection.

Denial of justice occurs when an alien has been injured in his person or property and the state has been negligent in repairing the injury. It may occur through a failure or delay of the country to admit him to the courts, to an unjust sentence passed or to the failure to punish the persons who have been guilty of inflicting the injury. It may also happen when an alien, accused of crime, is refused remedial court processes or when he is subjected to prolonged, cruel, or inhuman punishments. It is a fault of the government not to take adequate means to repair an injury no matter to what technicality the fault may be attributed.

The enforcement of the penalties of justice implies international responsibility on the part of the alien's state of residence. International responsibility can be enforced by the rules of diplomatic protection of citizens abroad. A state may interpose in behalf of its nationals and the conditions and extent of such interposition are recognized and standardized by the rules of diplomatic practice. These cannot now be contradicted. Sanctions which may be applied are various and severe. They extend from good offices through formal diplomatic protest, retaliation or reprisal, economic sanctions, and finally the use of force of arms, resulting if necessary in war against the law-breaking state.

SPECIFIC PRESCRIPTIONS OF INTERNATIONAL LAW

In the light of the minimum standard, as operative under the principles of responsibility, an alien has a positive status which we can describe in terms of specific rights and duties. Because of the broad sweep of personal and property rights it is impractical to attempt an exhaustive enumeration of them. Some are, at least in a general way, accepted by all people. Others are enumerated or specified in treaties. Still others have been upheld by international tribunals until they are considered part of international law.

International law does not guarantee the alien's freedom of religion. This is recognized as a matter of local law and aliens as well as citizens must conform to the regulations. As

a matter of comity, freedom is generally given; it is frequently guaranteed in treaties. Legally, a state may give preference to a certain religion or church. It may establish a state church with compulsory membership for aliens as well as citizens. Aliens who refuse to conform are entitled to the alternative of leaving the country. This implies that they be given time to arrange their affairs and that they be free from cruel and inhuman treatment during this interval. If they refuse to leave they may be deported. Remonstrances and good offices may be used to oppose the execution of such conformity laws, particularly if they affect large numbers of peoples. Retaliation may also be used, but is not a satisfactory solution of the problem.

Certain religious practices deemed contrary to public policy, dangerous to the health or morals, or contrary to the convictions of the people may be outlawed. Polygamy as advocated and formerly practiced by the Mormons has been forbidden by several countries. Free-Masonry as established in certain European countries has been suppressed as a political and subversive organization. Religious orders have been suppressed many times in history. Certain occupations such as teaching have been closed to alien clergymen and to members of specified religious or racial groups. Such practices are more often forbidden aliens than citizens.

Systematic policies for the suppression of certain religions have been common in history. Churches have been closed, property confiscated, the clergy persecuted or exiled. In the recent persecution of Jews and others in Germany, American remonstrances were answered to the effect that regulation of religion is a domestic affair and that Americans would not be treated more severely than others in the same category. The United States was not satisfied with these replies but has not taken further action except in individual cases. The situation would be very different if citizens of a particular nationality or race were discriminated against unfairly.

If regulation of religion should lead to active persecution, foreign states could intervene for the protection of the life

and property of their citizens. Cruel and inhuman treatment is considered sufficient reason for forceful intervention. On numerous occasions in the past, interventions have been undertaken on grounds of humanity in the interests of a persecuted people regardless of their nationality. It is of doubtful legal right, but a nation which treats its own or other people with inhumanity cannot for long outrage the sense of the civilized world, and threaten the very existence of civilized standards of social life.

An alien is not entitled to political rights or privileges. He is not entitled to vote, to hold office, to serve on a jury, to belong to political parties, to engage in political campaigns or, in a word, to carry on activities that the state considers to be political in nature. These are rightly considered prerogatives of citizens as the word citizen indicates. They are reserved for those who owe their loyalty to the country and who have the duty of preserving the life and institutions of the country. The alien may not engage in any overt act looking to the overthrow of governments of friendly states. The state of residence is not obligated by international law to forbid peaceful opposition to a friendly state, but to encourage it or take part in it is considered an unfriendly act on its part. If an alien in its territory plots against a friendly state he may be punished according to the local law or be deported. He need not be extradited for political offenses committed in either his former state or his present state of residence except in accordance with extradition treaties.

An alien may not ordinarily be enrolled in the permanent military service of the country against his will. If however, he has declared his intention to become a citizen he may be drafted for military training and service or be given the alternative of leaving the country, or of being forever debarred from acquiring citizenship. The non-declarant alien may not be taxed as a penalty for refusing to enter the armed forces, although a light tax for the benefits he receives from this exemption above those enjoyed by nationals (v.g. opportunity and time to do profitable things) might be demanded. The alien

too, in time of civil war or national emergency may be compelled either to resist a siege, to defend his home or locality, to do non-combatant service, or to leave the country within a reasonable and designated time. Many questions of military service are now governed by bilateral treaties. This is true especially of persons of dual nationality. In the absence of a treaty provision to the contrary, the state of residence, if it claims the person as its national, may insist upon his serving in the forces.

The economic status of the alien may be quite different from that of the citizen. The laws may forbid the alien to acquire certain kinds of property, particularly property in real estate, national resources, ships, etc. Personal property may usually be held on equal terms with nationals; immovable property is more or less curtailed. Nations may restrict certain professions and occupations to nationals only and such restrictions are common. The state may refuse an alien seeking to enter the country a permit to work, but if the alien is already within the country it may not deprive him of the opportunity of earning a living for himself or family. If it has shut off all avenues of earning a livelihood it must provide him sustenance, at least till he is enabled to leave the country or to communicate with his own government.

The country has much more definite economic obligations to the alien who is already possessed of wealth or property within the country. It may through its police and regulatory power destroy the value of the property of an alien if the regulatory law is enacted for the good of the country and affects all property evenly, including that of nationals and aliens. This has been done in regard to the slave trade and to traffic in liquor through prohibition laws. If a state devalues its money and this affects aliens equally with nationals, the former have no preferential action against the government. However, if the government changes laws in regard to its bonds or securities and does not promulgate the law, the alien creditor has a right of action in international law. In this case there is a repudiation

of a contract, at least an implied contract, and a state may not use its plenary powers to repudiate its obligations. The stamp laws of Mexico are an illustration of this.

The state may requisition or expropriate the property of aliens as it may of nationals. The conditions, however, are that it be done for a public purpose, that it be done according to due process of law and that just and prompt indemnity be paid. If these conditions are lacking, the process is confiscation, and confiscation is forbidden by international law. The state itself is the judge of the need of taking the alien property but it is obligated to arrange for adequate and prompt payment, to the agreement of the home state of the expropriated alien. These principles are illustrated in many recent land reform and natural resources developments in recent years, particularly those undertaken by Mexico beginning in about 1910. Only within the last few weeks the diplomatic controversy between the United States and Mexico in the land and petroleum programs was brought to a conclusion to the expressed satisfaction of both states. Great Britain and The Netherlands, on the other hand, have not yet settled their petroleum problem with Mexico, and insist that international law requires the return of the petroleum properties taken by the Mexican Government.

International law does not guarantee aliens freedom of education, of speech or press, of assembly and petition. The local law governs these matters and there is no recourse against the restrictions of the state unless restrictive laws are discriminatory, are enforced in a cruel and inhuman way, or in general result in a denial of justice.

As a general rule we may conclude that aliens are entitled to approximately that degree of protection in personal and vested property rights as are citizens and to the use of judicial remedies in case of dispute. They may not be given all of the rights (such as political and occupational) that citizens have and in that they occupy an unfavorable position. They may not, however, be treated cruelly, their property may not be taken away unjustly, and in that their position, because of diplomatic

protection, may be better than that of citizens. In the present state of international law the rights and duties of aliens do not admit of complete and precise definition, but they are substantial and important, and international law contributes effectively to their protection. It would be desirable if the nations would agree to an international bill of rights for the protection of the personal and property rights of alien persons but this cannot be expected in the discernable future.

BIBLIOGRAPHICAL NOTE

These conclusions have been reached as a result of extensive examination of a wide variety of original documents and commentaries on this important phase of international law. League of Nations documents were used extensively. Typical of these are those concerned with the *International Conference for the Progressive Codification of International Law* and the *Conference on the Treatment of Foreigners*. Many judicial decisions have been consulted, such as the *Reports of the Hague Court of Arbitration* and the *Publications of the Permanent Court of International Justice*. These were very important, especially in such fields as the protection of minorities and in the protection of property from confiscation. Decisions of several *Mixed Arbitral Tribunals* established after the World War and various *Reports of Claims Commissions* were valuable sources as indicating the increasing importance of conciliation and compromise in the peaceful settlement of vexatious questions. Claims Commissions to which the United States has been a party were generally preferred, although many others were consulted. Collections of judgments and commentaries on them, such as Scott's *Hague Court Reports*, Hudson's *World Court Reports*, and Feller's *Mexican Mixed Commissions* were very helpful.

Treaties involving many nations were examined as indicating the extent to which states are willing to go in the establishment of governing principles and in the acceptance of mutual rights and duties. *The United States Treaty Series* and the *League of Nations Treaty Series* are outstanding examples of treaty infor-

mation. Draft conventions such as those of the *Pan-American Conferences* and the *Harvard Law School Research in International Law* and extensive commentaries on these have been investigated as to the extent to which the principles expressed there are already accepted as well as indications of what authorities suggest as to further progress along these lines.

Diplomatic correspondence has been used extensively as an expression of the policy of governments and the application of principles to particular issues. *Papers Relating to the Foreign Relations of the United States*, various publications of the State Department such as *Press Releases* and the *State Department Bulletin*, *British and Foreign State Papers*, and others of like kind are mines of first-hand information. Much important material of this type is found in John Bassett Moore's *Digest of International Law*, and more recent material in Green Haywood Hackworth's *Digest of International Law*.

In books, monographs and articles, the status of law was found expressed together with the opinions of experts. Books such as Borchard's *Diplomatic Protection of Citizens Abroad*, Fenwick's *International Law*, Dunn's *The Protection of Nationals*, Eagleton's *Responsibility of States in International Law*, and Oppenheim's *International Law* and many others have been freely and constantly used. Specialized contributions such as Bouvé's *Exclusion and Expulsion of Aliens in the United States*, Nielsen's *International Law Applied to Reclamations*, Freeman's *Responsibility of States for Denial of Justice*, and many others have been most helpful.

Recent contributions such as those by Kelsen, Verdross, Bentwich, Borchard, Garner, and others in the *Recueil des Cours de l'Académie de Droit International*, in the *American Journal of International Law* and in other periodicals have furnished a wide variety of views on various phases of the subject.

A much more extensive list of contributions might be given but it is thought that this representative selection may serve to indicate the type of sources used and authorities consulted, and the writer gratefully acknowledges his indebtedness to these and other contributors to the literature of this important subject.

VITA

James Everett Williams was born in Cascade, Iowa, June 10, 1900. He received his grammar and secondary school education in the parochial and public schools of Iowa and South Dakota. In 1918 he joined the Congregation of the Clerics of St. Viator. He received his Bachelor of Arts degree from St. Viator College in 1923. In 1929 he took the Master of Arts degree, and in 1930 the degree of Bachelor of Sacred Theology from the Catholic University of America, and was ordained a Catholic priest in that year. He began his studies towards the Doctor's degree at the University of Illinois in 1933, but resumed his teaching work before completing his thesis. During the years from 1923 to the present he has been engaged in various teaching and parochial duties, chiefly at St. Viator College, Our Lady of the Lake College, and the University of Dayton where he is presently engaged. He returned to the University of Illinois in the Summer of 1942 to complete his work.

